Nos. 80-1134, 80-1155 and 80-1170

MAY 5 1981
L. STE
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEAD INDUSTRIES ASSOCIATION, INC., ET AL.,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.,

SOUTH CENTRAL BELL TELEPHONE COMPANY, ET AL.,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.,

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL.,
Petitioners,

v.

SECRETARY OF LABOR, ET AL.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MEMORANDUM OF PETITIONER NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. IN RESPONSE TO FEDERAL RESPONDENTS' AND UNION RESPONDENT'S MEMORANDA

EDWARD L. MERRIGAN
6000 Connecticut Avenue, N.W.
Washington, D. C. 20015
(202) 656-0210
Attorney for National Association of Recycling Industries, Inc.

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

Page

STATEMENT 2

I. PATENTLY, IN LIGHT OF FEDERAL RESPONDENTS' MEMORANDUM AND THE CONCESSIONS FOUND IN UNION RESPONDENT'S MEMORANDUM, THE PETITIONS FOR CERTIORARI MUST BE GRANTED WITH DIRECTIONS THAT THIS CASE BE REMANDED TO THE SECRETARY OF LABOR FOR FURTHER PROCEEDINGS 3

II. THE COURT SHOULD PROVIDE THAT ITS STAY OF THE PRESENT OSHA LEAD STANDARD SHALL REMAIN IN EFFECT UNTIL OSHA CERTIFIES THAT ALL PROCEEDINGS ON REMAND HAVE BEEN COMPLETED 5

CONCLUSION 7

Nos. 80-1134, 80-1155 and 80-1170

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

LEAD INDUSTRIES ASSOCIATION, INC., ET AL.,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.,

SOUTH CENTRAL BELL TELEPHONE COMPANY, ET AL.,
Petitioners,

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.,

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., ET AL.,
Petitioners,

v.

SECRETARY OF LABOR, ET AL.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MEMORANDUM OF PETITIONER NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. IN RESPONSE TO FEDERAL RESPONDENTS' AND UNION RESPONDENT'S MEMORANDA

Petitioners National Association of Recycling Industries, Inc. et al. in No. 80-1170 submit this memorandum in response to the memorandum recently filed by Federal respondents and respondent union herein.

STATEMENT

The court of appeals' majority opinion herein recognizes that this case presents "a number of important questions on appeal [which] are very close," and that the dissenting opinion raises "serious questions about a number of aspects of [OSHA's] rule-making."[1] The dissenting opinion, in turn, persuasively recites at least seven (7) reasons why OSHA's previous action in this case should be vacated and remanded.[2]

Now, Federal respondents, represented by the Solicitor General, have filed a memorandum which concludes as follows, at page 12:

> "The petitions for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded with directions to return the record to the Secretary for further administrative proceedings."

At page 8 of said memorandum, Federal respondents explain:

> "In the supplemental rulemaking proceeding, the Secretary intends to reconsider not only the feasibility and utility of cost-benefit analysis in the setting of standards, *but also the other issues presented in these petitions* [*for writ of certiorari*]. Thus, review by this Court of the lead standard would be inappropriate at the present time, even if the Court decides to rule on the cost-benefit question now before it in *American Textile Manufacturers Institute* v. *Donovan,* Nos. 79-1429 and 79-1583."

Under these circumstances, petitioners National Association of Recycling Industries, Inc. et al. respect-

---

[1] App. to LIA petition, at 7a, ftnt. 6.

[2] Id., at 249a.

fully submit there can be *no* justification whatsoever for respondent union's contention that, instead of granting the petitions for certiorari in these cases as Federal respondents now propose, the Court should instead summarily deny same.

I

PATENTLY, IN LIGHT OF FEDERAL RESPONDENTS' MEMORANDUM AND THE CONCESSIONS FOUND IN UNION RESPONDENT'S MEMORANDUM, THE PETITIONS FOR CERTIORARI MUST BE GRANTED WITH DIRECTIONS THAT THIS CASE BE REMANDED TO THE SECRETARY OF LABOR FOR FURTHER PROCEEDINGS

Federal respondents' memorandum now categorically concedes that—

(1) "virtually all the technological and economic evidence developed in the rulemaking proceeding was addressed to the achievability of the 100 ug/m^3 proposal"—*not* the 50 ug/m^3 lead standard ultimately adopted by OSHA;[3]

(2) "The Secretary admittedly had difficulty quantifying the costs of attaining the PEL in these industries . . .;"[4]

(3) "The Secretary did not undertake a formal comparison to determine whether there was a 'reasonable relationship' between the costs of the standard and its benefits to employees . . . . The Secretary rejected the view that such a 'cost-benefit' analysis must be made;"[5]

---

[3] Fed. Resp. Memorandum, pg. 2.

[4] Id., at pg. 4.

[5] Id., at pg. 5.

(4) "Although virtually all the evidence regarding the technological and economic feasibility of the permissible exposure level focused on the 100 ug/m³ proposal, the court of appeals approved the Secretary's approach in evaluating feasibility;"[6] and

(5) "[T]he Secretary [now] intends to reconsider not only the feasibility and utility of cost-benefit analysis in the setting of standards, but also the other issues presented in these petitions [for certiorari]. Thus, review by this Court of the lead standard would be inappropriate at the present time . . . ."[7]

Union respondent's memorandum, in turn, further concedes that "the Secretary has the authority to engage in a further rulemaking proceeding with respect to the occupational health standard governing employee exposure to lead" under Section 6(b) of the OSH Act (29 U.S.C. 655(b)).[8] It also concedes that a further rulemaking proceeding "may alter the substance of the standard and will, in any event, alter the content of the record and of the Secretary's findings."[9] Finally, the union's memorandum concedes that, "in these circumstances, review by this Court of the lead standard would be inappropriate at the present time."[10]

With this record now before the Court, petitioners National Association of Recycling Industries, Inc., et

---

[6] Id., at pg. 5.

[7] Id., at pg. 8.

[8] Union's memorandum, at pgs. 2, 3.

[9] Id., at pg. 2.

[10] Id. The union's memorandum states there is thus now "a consensus among the parties" on these points."

al., submit that patently (i) the pending petitions for certiorari should be granted and (ii) the Court of Appeals' majority opinion should be vacated with directions that this case be remanded to the Secretary of Labor for further rulemaking proceedings in line with the proposals contained in Federal respondents' memorandum. Those remand proceedings concededly will probably "alter the substance of the standard, and will, in any event, alter the content of the record and of the Secretary's findings." [11] Ergo, there is *no* room for the union's suggestion that the pending petitions for certiorari—which have now resulted in Federal respondents' voluntary proposal *"to reconsider not only the feasibility and utility of cost-benefit analysis in the setting of standards, but also the other issues presented in these petitions"*—should be denied.

II

THE COURT SHOULD PROVIDE THAT ITS STAY OF THE PRESENT OSHA LEAD STANDARD SHALL REMAIN IN EFFECT UNTIL OSHA CERTIFIES THAT ALL PROCEEDINGS ON REMAND HAVE BEEN COMPLETED

Federal respondents' memorandum states: [12]

> "During the pendency of the proposed administrative proceedings, it is the Secretary's intention that the lead standard now in effect (including an ambient air standard of 50 ug/m^3 obtained through the use of respirators) should be left undisturbed."

Essentially, that is what this Court's existing stay in these cases requires.

---

[11] Id., at pg. 2.

[12] Fed. Resp. memorandum, pgs. 10, 11.

The union's memorandum, however, argues that, in the event this Court grants the relief sought by Federal respondents' memorandum, it should nevertheless dissolve its stay and permit the present OSHA lead standard to become "fully operative." [13]

Clearly, any such action would be devastatingly wrong. *One of the purposes of Federal respondents' proposal is to determine on remand whether it is economically and technologically feasible under the OSH Act for the numerous industries involved in these cases to meet a lead standard as low at 50 ug/m³ through engineering controls and work practices alone (i.e., without the use of respirators).* Obviously, therefore, if this Court grants the relief sought by Federal respondents, it should not immediately reimpose all the engineering control requirements of the present standard which were previously stayed even prior to Federal respondents' proposal and which will be reconsidered by OSHA on remand.

Consequently, petitioners pray that if this Court grants the relief sought by Federal respondents, its order will be drawn in such manner as to continue the existing stay of the present standard in effect until OSHA certifies that the remand proceedings it seeks have been completed.

---

[13] Union's memorandum, pg. 3.

CONCLUSION

The relief sought by Federal respondents should be granted. The Court should also continue the existing stay of the present OSHA lead standard in effect until OSHA certifies that the remand proceedings it seeks have been completed.

Respectfully submitted,

EDWARD L. MERRIGAN
6000 Connecticut Avenue, N.W.
Washington, D. C. 20015
(202) 656-0210

Attorney for National Association of Recycling Industries, Inc.

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that copies of the foregoing memorandum were served by mail this 5th day of May, 1981, properly addressed to all counsel of record in this case.

/s/ EDWARD L. MERRIGAN
Edward L. Merrigan

see 80

1155

see 80

1170